A **ANUAR ABD AZIZ v. DATO' JOHN LEE SIEW NENG & ORS**

COURT OF APPEAL, PUTRAJAYA
LEE SWEE SENG JCA
SUPANG LIAN JCA
GUNALAN MUNIANDY JCA
B [CIVIL APPEAL NO: W-02(NCC)(W)-358-03-2020]
20 JANUARY 2023

Abstract: *A moneylending business comes into play when there exists some degree of system and continuity in the moneylending transactions. A single loan at interest, while sufficient to raise a rebuttable presumption under s. 10OA of the Moneylenders Act 1951 ('MLA'), it is important to differentiate between an isolated act of moneylending and engaging in the business of moneylending. The MLA does not apply to an individual who lends money, even with interest, unless he makes a business from it.*

MONEYLENDERS: *Moneylending transaction – Loan with interest – Loan secured by pledging properties as security – Claim for repayment of loan with interest – Whether lender carrying out 'business of moneylending' – Whether isolated act of moneylending – Whether presumption under s. 10OA of Moneylenders Act 1951 applicable – Whether lender imposed exorbitant interest*

MONEYLENDERS: *Moneylending transaction – Loan with interest – Loan secured by pledging properties as security – Claim for repayment of loan with interest – Whether lender carrying out 'business of moneylending' – Restitutionary remedy – Whether may be ordered to prevent injustice or unjust enrichment – Whether borrower entitled to redeem properties upon repayment of loan – Whether retention of properties would cause lender to be unjustly enriched*

The first respondent's ('R1') claim at the High Court was based on two loan agreements wherein R1 granted loans to the appellant. As securities for the loans, the appellant transferred three lands to the second respondent and five lands to the third respondent which were all redeemable upon full repayment of the loans. R1 thus claimed for the repayment of the loan plus interest. The appellant's case was that he had never agreed for any payment of interest in respect of both loans as claimed by R1 and counterclaimed for the return of the eight lands to the original owners. The crux of the appellant's defence at the High Court was that R1 was not a licensed moneylender when he granted the two impugned loans to the appellant and were, for all intents and purposes, friendly loans rather than moneylending agreements as defined under s. 2 of the Moneylenders Act 1951 ('MLA'). The High Court Judge ('HCJ') allowed R1's claim and dismissed the appellant's counterclaim. In this appeal, the appellant disputed that the two loans were merely friendly

loans and hence, raised the following issues: (i) whether the loan agreements entered between the appellant and R1 were illegal, void and unenforceable; and (ii) whether the lands ought to be returned to the appellant and/or the appellant's nominees as their original owners.

Held (varying High Court judgment with no order as to costs)
Per Gunalan Muniandy JCA delivering the judgment of the court:

(1) Section 10OA of the MLA provides, *inter alia*, that in any proceedings against any person where it is alleged that such person is a moneylender, proof of a single loan at interest made by such person shall raise a rebuttable presumption that such person is carrying on the business of moneylending. Moneylending *per se* is not prohibited under the MLA. However, it is important to differentiate between isolated acts of moneylending and engaging in the business of moneylending. Section 5 of the MLA makes it mandatory for a person to be licensed before that person could carry out the 'business of moneylending'. The HCJ's finding of fact that R1 was not carrying out a moneylending business was premised on a careful and thorough consideration and appraisal of the evidence as a whole and was clearly supported by the weight of evidence and hence, was not misconceived. (paras 24, 32, 34 & 40)

(2) While the appellant relied on s. 15 of the MLA, this was not the appellant's pleaded case. A claim can only be determined on matters and issues that were specifically pleaded to support the claim. Importantly, a moneylending agreement, as expressly defined in s. 2 of the MLA, must be an agreement made in writing. Without proof that R1 and the appellant had entered into an agreement made in writing, s. 15 of the MLA would not afford any assistance to the appellant. (paras 35 & 36)

(3) The presumption under s. 10OA of the MLA applied on the instant facts, based on the principle that a friendly loan was opposed to a normal borrowing from a moneylender from a financial institution, in that, the borrower was only obligated to repay the loan within a specified period of time with no interest charged, was a rebuttable presumption. Regardless of whether s. 10OA applied to this case, the fact remained that there was ample evidence to prove, on a balance of probabilities, that R1 was not carrying on a moneylending business at the time of giving out the impugned loans. The findings by the HCJ were not 'plainly wrong' and did not justify appellate intervention. (paras 41, 42 & 45)

(4) The restitutionary remedy may be ordered to prevent injustice or unjust enrichment to any contracting party regardless of whether s. 66 of the Contracts Act 1950 provides for it to remedy an injustice. The circumstances of the case strongly point to the conclusion that the sale

A and purchase transactions were not SPAs *simpliciter* and that they were, in reality, meant to serve as a security for the two loans. As the lands were all along intended as security for the loans, the appellant and his nominees would be entitled to redeem the properties upon repayment of the loans. The respondents' enrichment was unjustified, taking into
B consideration the fact that the value of the eight lands was far higher than the sums loaned to the appellant. (paras 48-50)

(5) The judgment of the High Court was thus varied. To qualify for a friendly loan, there must be no exorbitant charging of interest way beyond the prescribed rate for a secured loan under the MLA. The
C interest of RM2 million for the loan to be repaid within two weeks was disallowed as it was not a term that the appellant had agreed to freely. The appellant was ordered to pay the balance sum amounting to RM7,409,688.04 and costs and interests within 60 days from the day of the judgment and thereupon, the respondents should deliver a valid and
D registrable memorandum of transfer together with the issue documents of title to all the eight properties to the appellant. (para 53)

Case(s) referred to:

Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd [1995] 4 CLJ 283 FC ***(refd)***

E *Chow Yoong Hong v. Choong Fah Rubber Manufactory [1960] 1 LNS 17 PC* ***(refd)***

Dato' Tan Chin Woh v. Dato' Yalumallai V Muthusamy [2016] 8 CLJ 293 FC ***(refd)***

Dr Mansur Hussain & Ors v. Barisan Tenaga Perancang (M) Sdn Bhd & Ors [2019] 1 LNS 661 CA ***(refd)***

Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd [2015] 2 CLJ 453 FC ***(refd)***

Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***

F *Ho Weng Leong v. Ng Kee Chin [1996] 1 LNS 89 HC* ***(refd)***

Mahmood Ooyub v. Li Chee Loong & Other Appeals [2020] 1 LNS 660 CA ***(refd)***

Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors [2020] 10 CLJ 1 FC ***(refd)***

Ngui Mui Khin & Anor v. Gillespie Bros & Co Ltd [1979] 1 LNS 60 FC ***(refd)***

RHB Bank Bhd v. Kwan Chew Holdings Sdn Bhd [2010] 1 CLJ 665 FC ***(refd)***

G *S Quarry Sdn Bhd v. Desaru Development Corporation Sdn Bhd & Ors [2019] 1 LNS 93 CA* ***(refd)***

Sivalingam Periasamy v. Periasamy & Anor [1996] 4 CLJ 545 CA ***(refd)***

Sundaram Subramaniam v. Alamrio Properties Sdn Bhd & Ors [2016] 10 CLJ 645 HC ***(refd)***

Tan Aik Teck v. Tang Soon Chye [2007] 5 CLJ 441 CA ***(refd)***

H *UEM Group Bhd v. Genisys Integrated Pte Ltd & Anor [2010] 9 CLJ 785 FC* ***(refd)***

Legislation referred to:

Contracts Act 1950, ss. 24, 66

Moneylenders Act 1951, ss. 2, 5(1), (2), 10OA, 15

Rules of Court 2012, O. 18 r. 11

I

For the appellant - Kuldeep Kumar Jamna Dass & Athari Bahardin; M/s Kuldeep Kumar & Co

For the respondent - Andrew Chiew Ean Vooi, Nicola Tang Zhan Ying & Colin Yoong Shern Zian; M/s Lee Hishammuddin Allen & Gledhill

[Editor's note: For the High Court judgment, please see Dato' John Lee Siew Neng v. Anuar Abdul Aziz [2020] 1 LNS 804 (varied).]

Reported by S Barathi

JUDGMENT

Gunalan Muniandy JCA:

Introduction

[1] In the High Court, the first respondent/plaintiff's ('R1's') claim was based on two loan agreements wherein R1 granted loans to the defendant/appellant ('D'). As securities for the loans, D transferred three lands to second respondent ('R2') and five lands to third respondent ('R3') which were redeemable upon full repayment of the loans. R1 claimed for repayment of the said loan plus interest whereas D counterclaimed for the return of the eight lands transferred as securities to their original owners. This is an appeal by D against the judgment of the learned High Court Judge ('LJ') allowing 'R1's claim and dismissing D's counterclaim.

Brief Facts

First Loan

[2] Sometime in December 2014, upon the appellant's request, R1 agreed to lend the appellant a sum of RM2 million. The appellant agreed to transfer three lands to R1 and/or his nominees as securities for the loan by entering into sale and purchase agreement and the signing of Form 14A to execute the land transfers.

[3] The appellant transferred GM 1303 Lot 2819 and GM 1313 Lot 2816 to Naspermai ('R3') (R1's nominee) and GRN 1983 Lot 2935 to R1 as securities for the loan. The appellant was allowed to redeem the three lands upon repayment of the loan.

[4] The appellant repaid RM460,000 for the first loan.

Second Loan

[5] Sometime in February 2015, the appellant requested for another loan and agreed to transfer five lands as securities for the loan. A total of five lands were transferred to Maxvogue ('R2') (R1's nominee) from the appellant and his nominees namely the appellant's GM 185 Lot 2483 and GM 1385 Lot 4371, 3A Plantations' GRN 115 Lot 2538, Adlil Shah bin Anuar's GM 1370 Lot 4370 and Fadzarudin Shah bin Anuar's GM 1384 Lot 4368.

[6] For the second loan, the appellant requested for a loan of RM22 million. However, R1 had allegedly failed to fulfil his obligation for the said loan as agreed whereby R1 had only transferred a total sum of RM4,813,688.04 to the appellant. On the other hand, R1 claimed that he had furnished a sum of RM5,869,688.04 to the appellant for the second loan and had purportedly rejected a third request from the appellant for a loan of RM22 million.

[7] The appellant and/or his nominees were allowed to redeem the five lands upon repayment of the loan.

[8] R1 contended that the appellant had agreed to repay RM4,000,000 for the first loan within two weeks and an additional RM115,000 per month until full repayment of the first loan.

[9] For the second loan, R1 contended that the loan sum agreed was RM6,800,000 with a repayment of RM8,000,000.

[10] The appellant's case is that he never agreed for any payment of interest in respect of both loans as claimed by R1.

[11] R1's claims against the appellant are as follows:

(i) RM2,000,000 and RM5,869,688.04 as principal sum for the loans given to the appellant;

(ii) RM2,000,000 and RM115,000 per month (from May 2015 until full settlement) as interest for the first loan (the claim of interest of RM115,000 per month was withdrawn by R1 at the end of the High Court trial);

(iii) RM1,035,827.30 as interest for the second loan;

(iv) interest at 5% per annum on the judgment sum; and

(v) costs.

[12] The appellant counterclaimed, *inter alia*, for the return of the eight lands to their original owners *ie*, the appellant, 3A Plantations, Adlil and Fadzarudin.

[13] On 3 February 2020, the LJ delivered the judgment as follows:

(i) the appellant to pay R1 an amount of RM10,445,515.30 ("judgment sum"), being:

(a) RM3,540,000 in relation to the first loan; and

(b) RM6,905,505.34 in relation to the second loan;

(ii) the appellant to pay R1 pre-judgment interest on the judgment sum at a rate of 5% per annum calculated from the notice of demand issued on 7 January 2016 until the date of this judgment, 3 February 2020;

(iii) the appellant to pay R1 post-judgment interest on the judgment sum at a rate of 5% per annum calculated from 4 February 2020 until the date of full and final settlement by the appellant to the R1;

(iv) the appellant's counterclaim is dismissed;

(v) the appellant to pay R1 costs of RM120,000 subject to payment of allocator fees;

(vi) if the appellant fails to settle the costs of RM120,000 within 60 days from the date of this judgment, the appellant to pay R1 interest on the costs of RM120,000 at a rate of 5% per annum until the date of full and final settlement by the appellant to the R1; and

(vii) the original payment vouchers tendered in court and marked as exhs. P5A to P5J be released and returned to R1.

[14] Hence, the appellant filed an appeal *vide* notice of appeal dated 28 February 20202 against the High Court judgment.

Our Decision

[15] Our analysis will be centred on the appellant's grounds of appeal which, in summary, raise these issues:

(i) whether the loan agreements entered between the appellant and Dato' John (R1) are illegal, void and unenforceable; and

(ii) whether the lands ought to be returned to the appellant and/or the appellant's nominees as their original owners.

[16] The material determinative issues in this case as identified by the learned High Court Judge are as follows:

(i) in relation to the first loan, whether the parties had agreed that, if the first loan was not repaid within two weeks, the appellant would have to pay the respondent RM4 million in settlement of his obligations;

(ii) in relation to the second loan, whether:

(a) the amount of the loan was:

(1) for a sum of RM6.8 million, with the amount of repayment of RM8 million to be repaid within six months, as alleged by the respondent; or

(2) for sum of RM22 million, as alleged by the appellant, and

(b) the respondent proved that RM1,056,000 was disbursed in cash to the appellant;

(iii) whether the appellant was liable to the respondent under the Bills of Exchange Act 1946 for the cheques that were drawn by the appellant in favour of the respondent that were dishonoured;

(iv) whether the friendly loans were unenforceable under s. 15 of the Moneylenders Act 1951 or void under s. 24 of the Contracts Act 1950; and

(v) whether the sale and purchase agreements by which the lands were transferred to the respondent and his nominee companies as security for the friendly loans were sham agreements and thus void, and if so, whether the vendors of the lands were entitled to restitution.

[17] There were seven principal grounds of appeal outlined in the memorandum of appeal ('MOA') as follows:

(i) there was no agreement to repay RM4 million under the first loan;

(ii) the second loan was for RM22 million and not for RM6.8 million with an obligation to repay RM8 million;

(iii) for the second loan, the appellant did not receive RM1,056,000 in cash from the first respondent;

(iv) the interest payable under the second loan should not be pro-rated;

(v) the sale and purchase agreements were illegal moneylending agreements and contravened MA 1951;

(vi) the HC failed to find the lands were merely held as security and ought to be returned upon full repayment of the judgment sum;

(vii) the first respondent (R1) is not entitled to claim the losses purportedly arising from non-completion of the share sale agreement between Sfive Properties Sdn Bhd ("Sfive") and Flora Prospects Sdn Bhd ("Flora"); and

(viii) the HC failed to draw an adverse inference against the R1 for not calling the solicitors, Messrs Lau, Wong & Partners, as witnesses.

[18] It was pointed out to us that, notably, the appellant did not in its MOA challenge the High Court's finding that the sale and purchase agreements were not a sham, making it a non-issue.

[19] We would at the outset state briefly the law relating to appellate intervention. We agree with the appellant that the approach that an appellate court must adopt when hearing appeals against decision reached after a full trial is settled as pronounced by the Federal Court in the case of *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309; [2005] 2 MLJ 1 at p. 320 (CLJ); p. 10 (MLJ), where it was held that:

> In our view, the Court of Appeal in citing these cases had clearly borne in mind the central feature of appellate intervention, *ie*, to determine whether or not the trial court had arrived at its decision or finding correctly on the basis of the relevant law and/or established evidence. In so doing, the Court of Appeal was perfectly entitled to examine the process of evaluation of the evidence by the trial court. Clearly, the phrase 'insufficient judicial appreciation of evidence' merely related to such a process. This is reflected in the Court of Appeal's restatement that a judge who was required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. The Court of Appeal further reiterated the principle central to appellate intervention, *ie*, that a decision arrived at by a trial court without judicial appreciation of the evidence might be set aside on appeal. This is consistent with the established plainly wrong test.

[20] Likewise, it is also trite law that an appellate court hearing an appeal from a trial court will not interfere with the findings of the trial court unless it appears that the trial judge has misdirected himself or herself on the law or the facts; or has made findings which are against the weight of the evidence; or the decision arrived at is plainly wrong (see Court of Appeal cases of *Sivalingam Periasamy v. Periasamy & Anor* [1996] 4 CLJ 545; [1995] 3 MLJ 395 and *S Quarry Sdn Bhd v. Desaru Development Corporation Sdn Bhd* [2019] 1 LNS 93; [2019] MLJU 99.

[21] In support of this appeal, the principal issue raised by the appellant was whether the loan agreements entered into between the appellant and R1 were illegal, void and unenforceable on the basis that he was not a licensed moneylender when he granted two separate loans to the appellant. It was disputed that the two loans were merely friendly loans rather than moneylending agreements ('MLAs') as defined under s. 2 of the Moneylenders Act 1951 ('MLA 1951').

[22] As to the relevant definitions, s. 2 of the MLA 1951 provides that:

> "moneylender" means any person who carries on or advertises or announces himself or holds himself out in any way as carrying on the business of moneylending, whether or not he carries on any other business.
>
> "moneylending" means the lending of money at interest, with or without security, by a moneylender to a borrower.
>
> "moneylending agreement" means an agreement made in writing between a moneylender and a borrower for the repayment, in lump sum or instalments, of money borrowed by the borrower from the moneylender.

[23] It was the appellant's case that based on his testimony at the trial as to how he came to be introduced to R1 and his request to R1 through the introducer for a RM2 million loan and the events that followed R1 could only have been a moneylender.

[24] As regards the allegation that R1 had been carrying on the business of moneylending, s. 10OA of the Moneylenders Act 1951 provides that in any proceedings against any person where it is alleged that such person is a moneylender, proof of a single loan at interest made by such person shall raise a rebuttable presumption that such person is carrying on the business of moneylending. That person may then adduce evidence to rebut the presumption by proving that he is not carrying on a moneylending business.

[25] Interest is defined in s. 2 of the Moneylenders Act 1951 as follows:

> "interest" does not include any sum lawfully charged in accordance with this Act by a moneylender for or on account of stamp duties, fees payable by law and legal costs but, save as aforesaid, includes any amount by whatsoever name called in excess of the principal paid or payable to a moneylender in consideration of or otherwise in respect of a loan.

[26] At the outset, we would emphasise that the crux of the appellant's defence at the court below was that R1 was not a licensed moneylender when he granted the two impugned loans to the appellant and it was asserted thereof that the two loans were for all intents and purposes friendly loans rather than money lending agreements as defined under s. 2 of the MLA. From the factual matrix, it was contended that the most probable inference was that at the material time of the present transactions, R1 was carrying on a moneylending business which would explain why the introducer specifically introduced R1 to the appellant. As such, it was contended that the LJ's finding that the mere fact that a loan was granted cannot amount to a holding out that Dato' John was carrying on a business of moneylending is wrong for lack of judicial appreciation of evidence (see Federal Court case of *UEM Group Bhd v. Genisys Integrated Pte Ltd & Anor* [2010] 9 CLJ 785; [2018] Supp MLJ 363) and is a plain error in law.

[27] A summary of the appellant's submission as to the key facts in relation to R1 being in the moneylending business is that in view of s. 10OA of the MLA, Dato' John (R1) shall be presumed to be carrying on the business of moneylending for the following reasons:

(i) the fact that Dato' John had granted and/or entertained not one, but two (three, according to his own testimony) loan request from the appellant;

(ii) Dato' John had imposed interest on the said loans *ie*, repayment in excess of the principal sum; and

(iii) lending of money at interest is essentially the definition of "moneylending" in the Moneylenders Act 1951.

[28] Reference was made to the Privy Council case of *Chow Yoong Hong v. Choong Fah Rubber Manufactory* [1960] 1 LNS 17; [1962] 28 MLJ 74, where it was held at p. 77 (MLJ) that:

> In order to prove that a man is a money-lender within the meaning of the (Moneylenders) Ordinance, it is necessary to show some degree of system and continuity in his moneylending transactions. If he were left to discharge this burden without the aid of any presumption, a defendant might be frequently be in a difficulty. He might have had only one or two transactions with the money-lender and he might find it difficult to obtain evidence about the business done by the money-lender with other parties. Section 3 enables a defendant to found his claim on proof of a single loan made to him at interest, it being presumed, in the absence of rebutting evidence, that there were sufficient other transactions of a similar sort to amount to a carrying on of business.

[29] It was also impressed upon us that the facts in the Court of Appeal ('COA') case of *Mahmood Ooyub v. Li Chee Loong & Other Appeals* [2020] 1 LNS 660; [2020] MLJU 1868 are uncannily similar to the circumstances surrounding the present case in that the defendant in that case was persuaded to enter into a business venture and decided to borrow a sum or RM250,000. He was introduced by an acquaintance to one Ponytail Lee who assured the defendant that he could lend the money but needed the title to the property owned by the defendant as security for the repayment of the loan who was then asked to sign a blank and undated sale and purchase agreement. The COA upheld the defendant's assertion that the moneylending transaction was done under the cloak of an alleged sale and purchase transaction, hence illegal and unenforceable.

[30] On the issue of the presumption under s. 10OA of the MLA, the COA remarked, *inter alia* that:

> [230] … At any rate even a single loan at interest is enough to raise the presumption of that person carrying on the business of moneylending under the amendment effected by the Moneylenders (Amendment) Act 2011 which came into force on 15.4.2011. It introduced section 10OA which according to the Explanatory Statement to the Bill, seeks to facilitate the proof of business of moneylending. Section 10OA makes it even more difficult for a lender who had charged interest on the loan given to say it was a one-off transaction by allowing a legal presumption to be drawn against the lender as follows:
>
> …
>
> [233] The presumption of moneylender has not been rebutted.
>
> [234] The unlicensed moneylender cannot under the guise of not being covered by the Moneylenders Act 1951 take shelter in the freedom of contract in that parties can create contractual obligations not prohibited by the Act. The moment a Court of law makes a finding that the transaction is moneylending and the fact that the lender is not licensed to lend with interest that makes the whole agreement no matter how it is structured, into an illegal moneylending agreement which is unenforceable under section 15 of the Moneylenders Act 1951.

[31] In essence, the crucial issue for our determination was whether a single loan at interest is sufficient to raise the rebuttable presumption under s. 10OA of the MLA that the lender is carrying on a business of moneylending. While the appellant's primary position was that a single loan transaction where interest was charged was sufficient for the presumption of carrying on a moneylending business to be invoked, the contrary position taken by the respondent was that the learned judge's decision on this central issue was ultimately a finding of fact supported by ample evidence that at the material time of the loans granted to the appellant, R1 was not carrying on the business of moneylending within the meaning of the MLA.

[32] It was the appellant's contention that the LJ misapplied the law on s. 10OA of the MLA 1951 when he held that the presumption under s. 10OA is not applicable to civil proceedings. We share the respondents' view that notwithstanding the LJ's interpretation of s. 10OA which in our view is open to question ultimately the determining question would be whether there was ample evidence, as highlighted by R1, that he was not carrying on the business of moneylending. We were urged to appreciate that, importantly, moneylending per se is not prohibited under the MLA. "The Act was never intended to apply to an individual who lends money even with interest unless he makes a business from it." – *Sundaram Subramaniam v. Alamrio Properties Sdn Bhd & Ors* [2016] 10 CLJ 645 at para. [34].

[33] It is important for us to note the principle in *Ngui Mui Khin & Anor v. Gillespie Bros & Co Ltd* [1979] 1 LNS 60; [1980] 2 MLJ 9 at 12EG (left) where it was emphasised that:

> At the outset we wish to observe that the Moneylenders Ordinance, 1951 does not apply to moneylending but only to moneylenders. It does not make every moneylending transaction illegal and unenforceable. It is only a moneylending transaction of a moneylender which is the subject-matter of the Ordinance and must comply with its provisions on pain of being declared illegal and unenforceable by the court.

[34] We do not propose to discuss the plethora of authorities on the issue at hand but would stress the importance of differentiating between isolated acts of moneylending and engaging in the business of moneylending as aptly described by Lord Devlin in *Chow Yoong Hong v. Choong Fah Rubber Manufactory* [1960] 1 LNS 17; [1962] AC 209 at 218 as follows:

> To lend money is not the same thing as to carry on the business of money-lending. In order to prove that a man is a moneylender within the meaning of the Ordinance, it is necessary to show some degree of system and continuity in his moneylending transactions.

[35] We acknowledge that s. 5 of the MLA 1951 makes it mandatory for a person to be licensed before that person can carry out the "business of moneylending."

[36] While the appellant relied on s. 15 of the MLA 1951, which states "No moneylending agreement in respect of money lent after the coming into force of this Act by an unlicensed moneylender shall be enforceable," the respondents brought to our attention the fact that this was however not his pleaded case. It is trite law that a claim can only be determined on matters and issues that are specifically pleaded to support the claim. Importantly, a moneylending agreement as expressly defined in s. 2 of the MLA must be an agreement made in writing. Without proof that R1 and the appellant had entered into an agreement made in writing, s. 15 of the MLA would not afford any assistance to the appellant.

[37] In our considered view, the LJ had adequately and carefully considered the material facts and evidence relevant to the issue at hand when he concluded that the appellant clearly failed to establish that R1:

(i) carried on;

(ii) advertised;

(iii) announced himself as carrying on; or

(iv) held himself out as carrying on a moneylending business within the meaning of s. 5(1) and (2) of the MLA 1951. Without proving this, the appellant's allegation fails – *Barisan Tenaga*; affirmed by the Court of Appeal in *Dr Mansur Hussain & Ors v. Barisan Tenaga Perancang (M) Sdn Bhd & Ors* [2019] 1 LNS 661.

[38] The LJ took into consideration the evidence as a whole at the trial material to the central question as to whether R1 was carrying on the business of moneylending, particularly the fact that he was a businessman running a business of supplying building materials through various companies, which was undisputed. He also considered several other undisputed facts in relation to how both the first and second loans came to be granted to the appellant. Amongst others, the appellant had failed to call as a witness the introducer of the lender ('R1') for the second loan, who was a material witness as to whether R1 was in the moneylending business as alleged.

[39] In arriving at the finding that R1 had not lent money systematically and continuously for gain to be regarded as having engaged in a moneylending business, the finding was based on the evidence of the conduct of R1 prior to the present oral agreements.

[40] We do not propose to discuss the correctness of the LJ's view that under s. 10OA of the MLA the presumption only applies to criminal proceedings, there being two schools of thought on this issue of law. It would suffice for us to state that, to our minds, the LJ's finding of fact that R1 was not carrying out a moneylending business was premised on a careful and thorough consideration and appraisal of the evidence as a whole. His finding was clearly supported by the weight of evidence and hence, in our considered view, was not misconceived.

[41] On the premise that the presumption under s. 10OA of the MLA applied on the instant facts based on the principle that a friendly loan is opposed to a normal borrowing from a moneylender from a financial institution in that the borrower was only obligated to repay the loan within a specified period of time with no interest charged, we must bear in mind that it is a rebuttable presumption. (*Tan Aik Teck v. Tang Soon Chye* [2007] 5 CLJ 441; [2007] 6 MLJ 97).

[42] We are in full agreement with the respondents' position that regardless of whether s. 10OA applies to this case, the fact remains there was ample evidence to prove on a balance of probabilities that R1 was not carrying on a moneylending business at the time of giving out the impugned loans.

[43] We share the respondents' view that the first, second, third and fourth grounds that we have mentioned concern findings of fact based on facts and evidence adduced at trial. We hold that the findings are not "plainly wrong" and do not justify appellate intervention. See *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309; [2005] 2 MLJ 1 at para. [14].

[44] In conclusion, on the issue of liability of the appellant as pleaded by the respondents, for the foregoing reasons, we are inclined to agree with the respondents' contention that the LJ had not erred in his findings on the core determinative issues material to the claim as follows:

(i) on the first loan, that from the objective facts based on contemporaneous documents, R1 had made out his case, there existed an agreement that the appellant would repay RM4 million for the first loan.

(ii) as regards the second loan, that "on the facts" there was no agreement for a RM22 million loan, and "the agreement between the parties was for a sum of RM6.8 million". For this loan, the appellant received RM5,869,688.04 which includes RM1,056,000 in cash.

(iii) on illegality, that there was no breach of licensing requirements under s. 15 of the MLA 1951 as R1 was not carrying out the business of moneylending.

(iv) the appellant's counterclaim that the seven sale and purchase agreements were sham agreements has to be dismissed because there was "no evidence of any common intention the plaintiff and the defendant (or even between respective vendors and purchase of the lands) that the sale and purchase agreements were not to create binding rights and obligations that they gave the appearance of creating."

Hence, appellate interference was not called for in respect of the above.

[45] On the other grounds advanced in the appellant's defence, we also agree with the respondents that these concern findings of fact which the LJ arrived at based on facts and evidence adduced at trial. The findings are not

"plainly wrong" and do not justify appellate intervention. See *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309; [2005] 2 MLJ 1 at para. [14] and *Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors* [2020] 10 CLJ 1; [2020] 12 MLJ 67 at pp. 118 to 119.

[46] We will, lastly, deliberate on the LJ's decision to refuse an order of restitution of the lands held as security as sought by the appellant. On this issue, the respondents contended that the LJ did not err in allegedly refusing to order restitution as he had acted consistent with settled principles. It is not the duty of the court to invent or create a cause of action or a defence under the guise of doing justice for the parties: See *Dato' Tan Chin Woh v. Dato' Yalumallai V Muthusamy* [2016] 8 CLJ 293; [2016] 5 MLJ 590, FC at paras. [12] to [16] and *RHB Bank Bhd v. Kwan Chew Holdings Sdn Bhd* [2010] 1 CLJ 665; [2010] 2 MLJ 188, FC at paras. [31] to [37].

[47] The appellant, on the contrary, contended that, notwithstanding that restitutionary remedy had not been prayed for, the power of the court to grant this remedy is an issue of law. It was contended that, a plain reading of O. 18 r. 11 of the Rules of Court 2012 makes it clear that a point of law need not be pleaded as the word 'may' in the said rule is permissive rather than mandatory. That being the case, the failure of a party to mention it in the pleadings must not be held against him (see *Ho Weng Leong v. Ng Kee Chin* [1996] 5 MLJ 139).

[48] We concur with the appellant that a restitutionary remedy may be ordered to prevent injustice or unjust enrichment to any contracting party regardless of whether s. 66 of the Contracts Act 1950, provides for it to remedy an injustice. In the Federal Court case of *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283; [1995] 3 MLJ 331, it was held, *inter alia*, that:

> That the justice of the case should be overriding consideration is axiomatic. After all, courts exist to do justice according to the law as applied to the substantial merits of a particular case. And rules of court and of practice are created to facilitate the attainment of justice, not its obstruction.

[49] We also agree with the appellant that the circumstances of the case strongly point to the conclusion that the sale and purchase transactions were not SPAs simpliciter and that they were in reality meant to serve as a security for the two loans.

[50] Hence, in line with the respondents' own pleaded case that the eight lands were all along intended as security for the loans, the appellant and his nominees would be entitled to redeem the properties upon repayment of the loans. It was highlighted to us by the appellant that the respondents'

enrichment is unjustified taking into consideration the fact that the value of the eight lands, *ie*, RM23.2 million, is far higher than the sums loaned to the appellant, *ie*, RM6,813,688.04.

[51] Reference was made to the Federal Court case of *Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd* [2015] 2 CLJ 453; [2015] 2 MLJ 441, where it was held at p. 496 (CLJ); p. 484 (MLJ) that:

> [117] The principle underlying the cases of *Banque Financiere de la Cite v. Parc (Battersea) Ltd and Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v. IRC* is that, in the context of the present case, a cause of action in unjust enrichment can give rise to a right to restitution, where it can be established that:
>
> (a) the plaintiff must have been enriched;
>
> (b) the enrichment must be gained at the defendant's expense;
>
> (c) that the retention of the benefit by the plaintiff was unjust; and
>
> (d) there must be no defence available to extinguish or reduce the plaintiff's liability to make restitution.

[52] Restitutionary remedies focus on unjust enrichment to a contracting party at the expense of the claimant and may be ordered by court in appropriate cases in a range of factual circumstances. (see *Dream Property* (*supra*)).

Conclusion

[53] For the foregoing reasons and under the circumstances that we have alluded to, our decision and the orders that we made at the conclusion of the appeal are as follows:

(i) we find no good reason to disturb the general findings of fact of the LJ except that the loans taken amounted to only RM7,409,688.04 as supported by ten cash vouchers. A sum of RM460,000 had been repaid leaving a balance sum of RM7,409,688.04.

(ii) interest of RM2 million for the loan to be repaid within two weeks should be disallowed as it is not a term that the appellant had agreed to freely. We also disagree with the award of interest of RM115,000 per month which the respondents did not pursue.

(iii) to qualify for a friendly loan there must be no exorbitant charging of interest way beyond the prescribed rate for a secured loan under the MLA.

To conclude, we, therefore, vary the judgment of the High Court and allow the plaintiff/respondents to enter judgement for the sum of RM7,409,688.04 together with interest at 5% pa from date of demand of 7 January 2016 till date of High Court judgment on 3 February 2020 and thereafter, interest on the judgment sum at 5% pa till realisation.

The appellant shall be ordered to pay the above sum and costs plus interest, including for costs, within 60 days from today and thereupon the respondents shall deliver a valid and registrable memorandum of transfer ('MOT') together with the issue documents of title to all the eight properties to the appellant's solicitors.

In the event that the appellant fails to so make payment by the end of the 60 days period, the respondents shall be at liberty to proceed with a public auction of all the eight properties pursuant to the procedure for sale of land under the National Land Code ('NLC') and the ROC and the excess sum if any after the payment of the full judgment sum plus interest and costs together with the costs and expenses of the auction shall be refunded to the appellant.

The order of the High Court is varied only to the above extent.

We exercise our discretion and make no order as to costs for this appeal.